(2012) 01 MAD CK 0297

In the Madras High Court

Case No : Tax Case (Revision) No. 612 of 2006

State of Tamil Nadu — APPELLANT

Vs

Majestic Exports — RESPONDENT

Date of Decision : 27-01-2012

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 12(3), 12(4), 12(5), 12(5)(iii)

Citation : (2013) 58 VST 423

Hon'ble Judges : P.P.S. Janarthanaraja, J;D. Murugesan, J

Bench : Division Bench

Advocate : R. Sivaraman, Special Government Pleader T, for the Appellant; B. Raveendran, for the Respondent

Judgement

D. Murugesan, J.—This tax case revision, at the instance of the Deputy Commissioner (Commercial Taxes), Coimbatore, was admitted on the following substantial question of law:

Whether, in the facts and circumstances of the case, the Appellate Tribunal is right in deleting the penalty imposed over a transaction of the REP licence when the transaction has not been disclosed in the returns?

The respondent-assessee is engaged in the business of manufacture and exports of hosiery garments. The relevant assessment year is 1992-93. They had reported total and taxable turnover of Rs. 5,74,376 and "nil", respectively. Later accounts were called for and checked by the assessing officer and pre-assessment notice was issued proposing to levy of tax on sale of REP licence and exim scrip. No objection was filed and therefore, the assessing officer confirmed the proposal and finally assessed on total and taxable turnover of Rs. 5,74,376 and Rs. 5,74,376, respectively. Later, the assessing officer passed an order dated March 30, 1998, proposing to levy penalty at 150 per cent for the tax assessed on the ground that the assessee has not disclosed the taxable and turnover at premium received on sale of REP licence and exim scrip and levied penalty of Rs. 33,849 at 150 per cent u/s 12(5)(iii) of the Tamil Nadu General Sales Tax Act,

1959. Aggrieved by that order, the assessee has filed an appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner taking into consideration of the plea that there was bona fide belief, reduced the penalty to 50 per cent and modified the penalty amount at Rs. 11,283 u/s 12(5)(iii) of the Act. Aggrieved by that order, the assessee filed an appeal before the Tamil Nadu Sales Tax Appellate Tribunal, The Tribunal deleted the penalty and allowed the appeal on the ground that the assessee has not included the taxable turnover under the bona fide belief. Aggrieved by that order, the Revenue has filed the present appeal.

2. The learned counsel appearing for the Revenue submitted that the Tribunal ought not to have deleted the penalty when the assessee does not disclose the taxable turnover on sale of REP licence and exim scrip in the monthly return for the assessment year 1992-93 and hence, the order passed by the Tribunal is not in accordance with law and the same has to be set aside.

3. The learned counsel appearing for the respondent-assessee submitted that the assessee has not included the turnover under the bona fide belief that they are not liable to show it and therefore, it is not a fit case for levying penalty u/s 12(5)(iii) of the Act and in support of his contention, he relied on the judgments in the case o P.S. Apparels Vs. Deputy Commercial Tax Officer, T. Nagar East Assessment Circle, Madras and State of Tamil Nadu Vs. Indian Silk Traders Therefore, the order passed by the Tribunal is in conformity with law and the same has to be confirmed.

4. We heard the learned Special Government Pleader (Taxes) for the petitioner and the learned counsel for the respondent-assessee. The case of the assessee is that they were under the bona fide belief that they are not liable to tax on sale of REP licence and exim scrip and hence, they have not included the same in the total and taxable turnover. The only question to be decided is whether, on the given facts and circumstances of the case, the assessing authority could invoke the provisions of section 12(5)(iii) of the Tamil Nadu General Sales Tax Act for imposing penalty on the ground of non-disclosure of the turnover on the sale of REP licences and exim scrips. The Tribunal allowed the appeal in favour of the assessee by following the judgment of this court in P.S. Apparels Vs. Deputy Commercial Tax Officer, T. Nagar East Assessment Circle, Madras on the ground that the assessee had paid the tax as assessed by the assessing authority and that they had acted only under the bona fide belief that they were not liable to include the sales turnover of REP licences/exim scrips. That was a case where this court was considering the question as to whether REP licences/exim scrips are "goods" in etymological sense and in common parlance as also within the meaning of section 2(j) of the Tamil Nadu General Sales Tax Act, 1959 and section 2(d) of the Central Sales Tax Act, 1956 and ultimately held that the transfer, sale or assignment of those licences for value or consideration shall be liable to levy of sales tax and the levy of penalty under sections 12 to 16 of the Tamil Nadu General Sales Tax Act from the assessment year 1992-93 onwards.

The said judgment was quoted with approval by the Supreme Court in Vikas Sales Corporation and another, etc. etc. Vs. Commissioner of Commercial Taxes and another, etc. etc.,

5. However, in P.S. Apparels Vs. Deputy Commercial Tax Officer, T. Nagar East Assessment Circle, Madras this court held that though for purposes of levy of penalty under sections 12(3) and 16(2) of the Act, a finding regarding willful non-disclosure is a necessary ingredient and pre-requisite, it cannot be claimed that the culpability or bona fides of the assessee are totally strange concepts even while considering the levy of penalty u/s 12(4) and 12(5) of the Act. This court also referred to a Division Bench judgment of this court in State of Tamil Nadu Vs. Indian Silk Traders holding that though the element of deliberateness, willfulness or blameworthy conduct on the part of the assessee may not be necessary for invoking section 12(4) or 12(5), yet the bona fides of the assessee requires to be gone into before imposing the penalty since the underlying intent of penalty is only to deal with the non-disclosure of a turnover which with the oblique purpose of evading liability or postponing the payment of tax lawfully due to the State. Having regard to the above legal position, the case on hand must be considered. While considering the appeal, the Appellate Assistant Commissioner had not gone into the question of bona fides of the assessee. Nevertheless, by placing reliance on the judgment of this court in P.S. Apparels Vs. Deputy Commercial Tax Officer, T. Nagar East Assessment Circle, Madras while affirming the levy of penalty, had reduced the penalty from 150 per cent to 50 per cent which, according to the assessee, was not in accordance with the said judgment. Since the claim of the assessee was that they were under the bona fide belief that the sale of REP licences/exim scrips was not goods, they did not disclose the same in the returns and they preferred appeal to the Tribunal. The Tribunal also upheld their contention and allowed the appeal. In our opinion, as the issue has been settled by this court in the abovesaid judgment, we are unable to take a different view on the facts and circumstances of this case. Accordingly, we are of the view that the Tribunal is correct in deleting the penalty and we confirm the order of the Tribunal and dismiss the tax case (revision) with no order as to costs.